Supreme Court, U.S.
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No. 02-1583

IN THE

Supreme Court of the United States

JOAN A. CLABBERS,

Petitioner,

v.

GULFSTREAM AEROSPACE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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ISSUES PRESENTED

A. Whether the lower courts correctly held that Clabbers' claims of sex discrimination under the Equal Pay Act and Title VII are barred by the applicable statutes of limitation when she filed suit in March 2001, but stipulated that she does not claim sex discrimination from the year 1996 forward.

B. Whether the lower courts correctly held that Clabbers failed to exhaust administrative remedies for any Title VII claims and equitable tolling does not apply, where she never filed an EEOC charge and admits that she was never told that she could not or should not file a charge.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Gulfstream Aerospace Corporation is a wholly-owned subsidiary of General Dynamics Corporation, a publicly-traded company.

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STATEMENT OF THE CASE

Clabbers is not contesting the rules of law applicable to her case. Instead, Clabbers is dissatisfied with how the lower courts applied the law to the facts of her case. The lower court decisions contested here raise no new or novel issues and are not a departure from the accepted and usual course of judicial proceedings. Likewise, the Eleventh Circuit's decision does not conflict with the decisions of other courts of appeals on the same matter. The petition should be denied.

A. Course of Proceedings

On March 23, 2001, Joan Clabbers sued her former employer Gulfstream Aerospace Corporation ("Gulfstream") for alleged sex discrimination, challenging her compensation under both the Equal Pay Act ("EPA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). After the close of discovery, Gulfstream moved for summary judgment, arguing that Clabbers' claims were barred by the applicable limitations periods and that her Title VII claims were also barred by her failure to exhaust administrative remedies. Clabbers never filed a charge of sex discrimination with the EEOC. Moreover, Gulfstream contended that Clabbers could not establish substantive claims of pay discrimination under either statute.

The district court granted Gulfstream's motion for summary judgment on failure to exhaust and statute of limitations grounds. Clabbers had admitted that she never filed a charge of discrimination with the EEOC and that she was never told that she could not or should not file a charge. Further, Clabbers stipulated that she did not claim sex discrimination from 1996 forward. Pet., App. B. The district

court concluded that the doctrine of equitable tolling did not save her claims. Pet., App. B at 8a-12a. The court also found that Clabbers could not assert a continuing violation theory because she could not show a violation within the applicable limitations period. Pet., App. B at 8a-12a.

The Eleventh Circuit affirmed the district court's findings on both claims. As to the Title VII claim, the appellate court determined "the record in this case clearly establishes that Clabbers did not timely file the requisite charge before the EEOC, and that there was no waiver of this requirement by the EEOC." Pet., App. A at 2a. As for Clabbers' EPA claim, the Eleventh Circuit concluded "the record clearly supports the district court's determination that the statute of limitations bars Clabbers' EPA claim." Pet., App. A at 3a. Clabbers' petition for rehearing was denied. Pet., App. C at 13a.

B. Statement of Facts

Gulfstream manufactures and services business aircraft. Clabbers began working at Gulfstream in 1975, left for a brief period of time, and returned in September of 1976. She transferred from job to job within the company over the course of her career, reporting to different supervisors in different departments. Clabbers admits that from 1996 forward, there were no men performing the same or similar jobs she performed and that she does not compare herself to any men for purposes of pay during this time period. Pet., App. B at 6a-7a.

Clabbers' employment ended in September of 2000 when she was included in a reduction in force. As part of her severance package, Clabbers received 27 weeks of salary

continuation and severance pay through March of 2001.[1] Six months after her termination, Clabbers filed a complaint in the State Court of Chatham County, Georgia, alleging that throughout her 24 years of employment, Gulfstream did not provide her with pay equal to that given to similarly situated male employees in violation of the EPA and Title VII. Gulfstream removed her claims to the United States District Court for the Southern District of Georgia.

1. *Clabbers Admits She Knew Of Her Pay Claims When They Arose But She Never Filed A Charge*

During the course of the litigation and as part of a proposed pretrial order filed before the district court ruled on the parties' motions for summary judgment, Clabbers stipulated that she "was treated differently because of her sex from 1986 to 1992," and that she "does not claim sex discrimination from 1996 until her termination in September 2000." Clabbers also stipulated that "all of the jobs [in question at Gulfstream] were unique, including hers." In her previously filed brief on summary judgment, Clabbers admitted that "there were no men to whom she felt she could compare herself for pay purposes [from 1996 forward]."

Clabbers testified that from the first incident of alleged sex discrimination in the mid-1980s through every subsequent alleged incident of sex discrimination, she thought at the time that she was being treated differently

1. Clabbers contends that she received a disparate salary through December 2000, even though she ceased working in September of 2000. Employees discharged in the reduction-in-force received various amounts of severance depending upon their time with the company. Affected employees were kept on the payroll at their salaries at the time of termination through the term of their severance.

because of her sex: "Q: And during that period of time [1985/1986-1992/1993], did you believe that you were being discriminated against in pay because of your sex? A: Yes." Clabbers confirmed, "I knew from when I became a supervisor [in the mid 1980s] on that I was not paid equal to the men." She also admitted that she was aware of the EEOC and its function, and that she was familiar with EEOC charges of discrimination. Indeed, in October 2000, Clabbers filed a charge of age discrimination against Gulfstream arising out of her termination in the September 2000 reduction-in-force. Nevertheless, Clabbers never filed a charge with the EEOC alleging sex discrimination.

2. ***When Clabbers Finally Went To The EEOC, She Never Asked To File A Charge And Was Never Told That She Could Not File A Charge***

In July of 2000, the Office of Federal Contract Compliance Programs ("OFCCP") and Gulfstream entered into an agreement wherein Gulfstream agreed to adjust salaries for certain positions but did not admit any liability. Clabbers received a notice of the agreement from Gulfstream along with an offer of backpay in exchange for a release. Clabbers rejected the offer. In March of 2001, Clabbers received a letter from the OFCCP in response to a Freedom of Information Act Request which attached a copy of the agreement between the OFCCP and Gulfstream. According to Clabbers: "When I got the letter from the OFCCP, that validated the feelings and everything that I knew, and I was — I decided to go ahead with it."

Clabbers then went to the EEOC (for the second time, the first being when she filed her charge of age discrimination in October 2000). Although she contends that the EEOC

"refused" to accept a charge of discrimination, her allegation is directly contradicted by her deposition testimony:

> Q: Did you say to anyone at the EEOC I'd like to — I'd like to file a charge of sex discrimination?
>
> A: No.
>
> Q: Did you try to file a charge of sex discrimination?
>
> A: As a result of [the OFCCP] letter?
>
> Q: As a result of anything?
>
> A: No.
>
> Q: Did you say to anyone at the EEOC I want to fill out a charge of sex discrimination and the EEOC said no, you can't?
>
> A: No.

According to Clabbers, the EEOC representative told her that the EEOC would likely not conduct an investigation because the OFCCP had already done so. As Clabbers' testified, however, the EEOC representative did not tell her that she could not or should not file a charge.

REASONS FOR DENYING THE PETITION

A. The Lower Courts Applied Well-Established Law To Find That Clabbers Failed To Exhaust Her Administrative Remedies

Although Clabbers argues that the record shows that the EEOC "waived" any filing requirements by "refusing" to accept Clabbers' charge, the actual evidence in the record belies her contentions. It is undisputed that Clabbers never asked to file a charge of discrimination with the EEOC, nor was she ever told that she could not or should not file a charge. The only question at issue, then, is whether equitable remedies excuse Clabbers failure to file a charge.

The timely filing of a charge of discrimination is not a jurisdictional prerequisite to filing suit under Title VII. Rather, the filing requirements are subject to equitable principles of waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985). Even so, this Court and the lower courts are in agreement that equitable remedies should be applied sparingly. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Irwin v. Veteran's Admin.*, 498 U.S. 89 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984); *Montoya v. Chao*, 296 F.3d 952 (10th Cir. 2002); *Amini v. Oberlin College*, 259 F.3d 493 (6th Cir. 2001); *Carter v. West Pub. Co.*, 225 F.3d 1258 (11th Cir. 2000); *Seitzinger v. Reading Hosp. and Med. Ctr.*, 165 F.3d 236 (3d Cir. 1999); *Briley v. Carlin*, 172 F.3d 567 (8th Cir. 1999); *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380 (9th Cir. 1997); *Tyler v. Runyon*, 70 F.3d 458 (7th Cir. 1995); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Rys v. U.S. Postal Serv.*, 886 F.2d 443 (1st Cir. 1989); *English v. Pabst Brewing Co.*, 828 F.2d 1047 (4th Cir. 1987).

In the instant action, equitable tolling might be justified if Gulfstream or the EEOC somehow misled Clabbers, or if she relied upon Gulfstream or the EEOC to her detriment. *See, e.g., Irwin*, 498 U.S. at 96 (equitable relief granted sparingly, typically in situations where claimant actively pursued judicial remedies but filed defective pleading during statutory period, or where complainant has been tricked by adversary's misconduct into allowing the filing deadline to pass); *Miller*, 766 F.2d at 493-94 ("equitable tolling may be appropriate when a plaintiff has been 'lulled into inaction by . . . state or federal agencies' or 'if a plaintiff is 'actively misled'"'); *Smith v. McClammy*, 740 F.2d 925, 927 (11th Cir. 1984) ("equitable tolling is based upon the actions of someone other than the claimant that are misleading or constituted fraudulent conduct"). Clabbers, however, makes no allegation that Gulfstream, or even the EEOC, misled her. The lower courts properly declined to apply equitable remedies where Clabbers admits that she never asked to file a charge and that she was never told that she could not or should not file a charge.

Moreover, even assuming, *arguendo*, that the EEOC misled Clabbers, the lower courts properly declined to waive Clabbers' filing requirements because, as the district court noted, "She admits she knew about alleged gender-based discriminatory actions more than three years before she filed this action." Pet., App. B at 10a. Clabbers cannot take advantage of equitable remedies when she has not diligently pursued her legal rights. *Irwin*, 498 U.S. at 96 (equitable doctrines inapplicable where claimant has failed to "exercise due diligence in preserving [her] legal rights"); *Baldwin County*, 466 U.S. at 151 ("one who fails to act diligently cannot invoke equitable principles to excuse the lack of diligence").

Although Clabbers cites the decisions of *Rys v. U.S. Postal Service*, 886 F.2d 443 (1st Cir. 1989) and *Hart v. J.T. Baker Chemical Corp.*, 598 F.2d 829 (3d Cir. 1979) in support of her argument that the Eleventh Circuit's ruling in the present case creates a split in the circuits, the two decisions are instead consistent with this case. Both the *Rys* and *Hart* decisions hold, consistent with *Zipes*, that although Title VII's filing requirement may be equitably tolled, the doctrine is narrowly construed. In fact, both decisions affirmed lower court rulings finding that equitable tolling was inapplicable on the facts presented, as is true in the present case. In *Hart*, for example, the Third Circuit affirmed the district court's determination that equitable tolling was inapplicable because the plaintiff there was aware of the alleged sex discrimination when it occurred but failed to file a timely charge. *Hart*, 598 F.2d at 834. In *Rys*, the First Circuit rejected the plaintiff's argument that he was misled by a letter from the EEOC, in part because the record evidence belied his claim, and because he was less than diligent in pursuing his claims. *Rys*, 886 F.2d at 447-448. The circuit courts are not split, but rather are in agreement.

B. The Lower Courts Applied Well-Established Law To Find That Clabbers' Claims Were Barred By The Applicable Statutes Of Limitation

Charges of discrimination under Title VII must be filed within 180 days of the last discriminatory act. 42 U.S.C. § 2000e-5(e). The limitations period for claims arising under the EPA is two years, three years for willful violations. 29 U.S.C. § 255(a). The limitations period begins running "from the date the employee knows or reasonably should know that he or she has been discriminated against." *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533,

1545 (11th Cir. 1988) (citations omitted). "The purpose of the requirement is to 'put defendants on notice of adverse claims and prevent plaintiffs from sleeping on their rights.'" *Id.*, *citing Parker v. Crown Cork & Seal Co.*, 462 U.S. 345, 353 (1983).

1. *Clabbers Admits That She Has No Claims Within The Applicable Limitations Periods*

Clabbers testified that she was contemporaneously aware of alleged sex discrimination as each new alleged claim arose during her career. Although she argues now that she became convinced of alleged sex discrimination only after receiving the OFCCP letter in March 2001, the district court correctly relied upon Clabbers' deposition testimony wherein she admitted that she knew "from when [she] became a supervisor [in the early 1980s] on that [she] was not paid equal to men." Pet., App. B at 7a.

Just as Clabbers admitted that she had known for years that she believed herself to be the subject of sex discrimination, she also admitted that she has no claims for sex discrimination from 1996 forward. Pet., App. B at 6a-7a. Recovery under the EPA is limited to the two or three year limitations period calculated back from the commencement of an action. 29 U.S.C. § 255(a); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 380 (11th Cir. 1995) ("a plaintiff only recovers unpaid wages for the allowable statutory period"); *see also Pollis v. New School for Soc. Research*, 132 F.3d 115 (2d Cir. 1997); *Gandy v. Sullivan County, Tennessee*, 24 F.3d 861 (6th Cir. 1994); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992). Clabbers' action commenced on March 23, 2001, the date of filing, and any recovery would be limited to alleged wage disparities going

back, at most, to March 23, 1998. Since Clabbers admitted that she has no claim of sex discrimination after 1996, the lower courts correctly concluded that the statute of limitations barred her claims.[2] *See also Morgan*, 536 U.S. at 114 (plaintiff can only file a charge to cover discrete acts that occurred within the appropriate time period).

2. *The Continuing Violation Theory Does Not Save Clabbers' Claims*

Clabbers contends that every paycheck she ever received while at Gulfstream, and even the severance pay received following her termination, started the limitations period anew, and thus her claims are timely. Clabbers did not, however, allege that Gulfstream perpetuated a discriminatory salary structure, nor did she bring a pattern or practice claim. *Bazemore v. Friday*, 478 U.S. 385, 395 (1986); *see also Morgan*, 536 U.S. at 112. Instead, Clabbers alleged that every time she transferred to a new job, under a different supervisor, she experienced disparate treatment anew. Any theoretical "continuing violation" ended when Clabbers transferred to a new position, a new department, or a new supervisor, and was subject to subsequent pay decisions. When Clabbers' allegations are analyzed in conjunction with her admission that she had no claims of sex discrimination at all after 1996, the district court, affirmed by the Eleventh Circuit, correctly concluded that the continuing violation

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2. Clabbers' suggestion, made for the first time in this Court, that the limitations period was somehow tolled during the pendency of the OFCCP investigation into Gulfstream's pay practices is incorrect. *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) ("the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods").

theory was inapplicable. *See Morgan*, 536 U.S. at 112-114 (discrete discriminatory acts are not actionable if time barred); *see also Watson v. Blue Circle, Inc.* No. 01-15432 (11th Cir. March 21, 2003) (same); *City of Hialeah v. Rojas*, 311 F.3d 1096 (11th Cir. 2002) (rejecting application of continuing violation theory because employer had discontinued alleged discriminatory policy); *Pollis*, 132 F.3d at 119 (recurring pay discrimination does not constitute a continuing violation because each receipt of a paycheck is the basis for a separate cause of action for which suit must be brought within the limitations period); *Dasgupta v. Univ. of Wisconsin Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997) (rejecting application of continuing violation theory to pay claim); *Knight v. Columbus, Ga.*, 19 F.3d 579 (11th Cir. 1994) (rejecting application of continuing violation theory to an FLSA claim); *LeBlanc v. City of Tallahassee*, 2003 WL 1485063 (N.D. Fla. 2003) (rejecting application of continuing violation theory, noting that "each pay increase was a discrete act that gave rise to a separate disparate pay claim."); *Peters v. City of Stamford*, 2003 WL 1343265 (D. Conn. 2003) (finding that each paycheck issued to plaintiff constituted a discrete employment action not subject to continuing violation theory); *Inglis v. Buena Vista University*, 235 F. Supp. 2d 1009, 1024-1030 (N.D. Iowa 2002) (discrete claims of pay discrimination not brought as pattern or practice case not subject to continuing violation theory); *Krough v. Cessford Const. Co.*, 231 F. Supp. 2d 914 (S.D. Iowa 2002) (rejecting application of continuing violation theory to wage claim); *see further Lewis v. Oklahoma ex rel. Board of Regents for Tulsa Community College*, 42 Fed. Appx. 160 (10th Cir. June 18, 2002) (unpublished) (because plaintiff was aware that her salary was lower than her male comparators, the continuing

violation theory did not make timely her claim of pay discrimination premised on wages set six and seven years before she filed a charge).

CONCLUSION

Clabbers testified that she was contemporaneously aware of alleged sex discrimination throughout her career but never filed a charge of sex discrimination with the EEOC. She testified she was never told that she could not or should not file an EEOC charge. She testified and then stipulated that she had no claims of sex discrimination after 1996. The Eleventh Circuit properly affirmed the district court's ruling that Clabbers' claims were barred by her failure to exhaust administrative remedies and by the applicable limitations periods. In so holding, the lower courts applied well-established rules of law. The Eleventh Circuit's order is not in conflict with any decisions of this Court or any of the other courts of appeals. The petition for a writ of certiorari should be denied.

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